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IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 1203

FRANK RYMARKIEWICZ,

Petitioner,

against

PITTSBURGH STEAMSHIP COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Frank Rymarkiewicz, respectfully alleges:

A

Summary Statement of Matters Involved

This action was commenced on the 15th day of September, 1943, seeking the payment of overtime wages and liquidated damages under Section 16(b) of the Fair Labor Standards Act of 1938.[1] The petitioner was permitted to intervene by order dated June 29, 1944 and filed his amended complaint on September 21, 1944. At the trial,

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060; Tit. 29, U. S. C. A., Sec. 201 et seq.

held on December 5, 1944, petitioner was the only plaintiff to appear and testify. The actions of each of the plaintiffs who had not appeared were dismissed with the exception of two who were in the military service of the United States, as to whom they were continued for the duration of the war. Judgment was rendered against the petitioner by the District Court on the ground that the evidence disclosed that he was not engaged in commerce; not engaged in the production of goods for commerce and, moreover, was a seaman and thus excluded from the benefits of the Act by Section 13(a)(3).

The respondent operates a fleet of ore carrying vessels on the Great Lakes. During the navigation season, these are operated in trade and commerce from one state to another and between ports in the various states bordering on the Great Lakes. In the fall, at the close of the season, the vessels are laid up; in the spring, the vessels are fitted out, that is, prepared for navigation.

The plaintiff was employed on several of these vessels, both during the navigation season and the periods of lay up and fit out. During the season, he was a fireman and performed work directly concerned with navigation. His primary duty was to keep steam up in the ships' boilers. Incidentally and occasionally he assisted in minor repairs. In fitting out and laying up, however, the vessel's boilers and engines might not even be in operation, and the ship would then obtain power from shore (R. 32). Where this was impracticable, one boiler was fired, not for navigation, because the ship was not in navigation, but only enough to keep her dynamo running. In the main, during these periods, petitioner worked at general repairs—painting, scraping rust, replacing equipment and the like (R. 62). He did this work under the supervision of the engineers. The master of the vessel was not aboard during these times, nor did she have a full crew. The vessel was not at sea; it was tied up alongside the dock.

The petitioner and the other seamen signed what was in form maritime articles of agreement when they went to

work at fit out. The agreement provided for a monthly rate of pay but does not, of course, describe the voyage, since no voyage was yet in prospect. The same form of employment contract is used after the navigation season for lay up work.

The monthly rate of pay received by the petitioner during the time the vessel is out of navigation is the same as that received during the season and he is paid in the same way. However, instead of standing four-hour watches, twice each day for the full week, during lay up and fit out, he worked eight hours daily for six days. Occasionally he was required to work on Sundays to keep steam in one boiler.

The issue is thus presented whether the employees who repair and maintain the respondent's vessels while they are not employed in navigation are seamen, and whether the work so performed is of a character to be covered by the Act.

B

Jurisdiction

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 [Tit. 28, U. S. C., Sec. 347(a)].

C

Question Involved

This case presents for decision two questions. The first is whether an employee whose work consists of repairing and maintaining an instrumentality of interstate commerce in preparation for its use is engaged in commerce or in the production of goods for commerce. The vessel upon which petitioner was employed was not in navigation, but the

work he did was necessary for its use as such. The second question is whether an employee who, when the vessel is in navigation, is a member of her crew and thus a seaman and exempt from the application of the Act, remains a seaman, and exempt, even when the ship is withdrawn from navigation and he is employed, not in aid of navigation, but in the making of general repairs such as might be made in drydock.

D

Reasons for Granting the Writ

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The rights of large numbers of employees to the benefits established by the Fair Labor Standards Act are involved, and the case presents a question of importance to its administration.

The petitioner was a seaman by calling; but the Court below was in error when it failed to distinguish between his duties while his vessel was in navigation and while it was not. The District Court found that petitioner was not engaged in commerce because the vessel had been withdrawn from navigation; from this it would follow that petitioner could not be a seaman while working on her, since a seaman is one whose work assists navigation. Nevertheless, the District Court also found he was a seaman.

The Circuit Court did not pass directly on the issue of commerce, but sustained the judgment below simply on the finding that petitioner was a seaman and thus exempt. It failed to give sufficient weight to the legislative history of the exemption and to the position of the Administrator of the Wage and Hour Division of the Department of Labor who filed a brief in support of the petitioner's claim.

The question of commerce, too, is one important to the administration of the Act. The District Court, with what

was apparently the tacit approval of the Circuit Court of Appeals, construed the language of the statute in a manner so narrow as to restrict its application within the narrowest limits and in a manner probably in conflict with applicable decisions of this Court. Because the vessels upon which the petitioner was employed were not in active operation at the time he worked, could not deprive them of their character as instrumentalities of commerce. The work was necessary to make them so, and the only function they had was to transport goods from one state to another. The petitioner was clearly a link in the chain of commerce.

The decision of the Court below has thrown considerable doubt on the application of the Act and it is necessary that this Court resolve the issues thus created to the end that administration be rendered more certain.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a complete transcript of the record and all proceedings had in said Circuit Court of Appeals for the Sixth Circuit in the case therein entitled Harold Lee Weaver, et al. against Pittsburgh Steamship Company and that said case may be reviewed and determined by this Court and the decision therein finally revised; and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem appropriate.

Respectfully submitted,

FRANK RYMARKIEWICZ,

By WILLIAM L. STANDARD,
Attorney.

IN THE

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OCTOBER TERM 1945

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Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

I

Statutes Involved

Fair Labor Standards Act of 1938, Act of June 25, 1938, Tit. 29, U. S. C. A., Secs. 201, et seq.

Sec. 3:

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does

not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Sec. 7:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours after the expiration of the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Sec. 13:

"(a) The provisions of sections 6 and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or

(2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or

(3) any employee employed as a seaman; * * *."

II

Opinions Below

The decision of the Circuit Court is reported at 153 F. (2) 597 (C. C. A. 6) as *Weaver et al.* v. *Pittsburgh S. S. Co.* The decision of the District Court was rendered December 5, 1945, and is not officially reported (R. 103). The order for mandate is dated February 4, 1946.

III

Jurisdiction of This Court

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Tit. 28, U. S. C., Sec. 347(a)).

IV

Statement of Case

A full statement of the case is to be found in the petition and is, therefore, omitted here.

V

Questions Involved

1. Is an employee on a vessel temporarily removed from navigation who is engaged in making repairs and in gen-

eral maintenance work necessary to enable the vessel to re-enter interstate navigation at some future time, an employee employed as a seaman within the meaning of Section 13(a)(3) of the Fair Labor Standards Act?

2. Is an employee on a vessel temporarily removed from navigation, engaged in performing such work, engaged in commerce or in the production of goods for commerce?

VI.

Error Relied Upon and Summary of Argument

A. Error relied upon.

The Circuit Court was in error when it held that petitioner was employed as a seaman and exempt under the provisions of Section 13(a)(3) of the Act. The question was raised at the trial in the District Court by the answer interposed by the respondents and in petitioner's motion for findings of fact and conclusions of law, and decided adversely to the petitioner. It was again raised in the petitioner's brief to the Circuit Court of Appeals and again decided adversely to him.

B. Summary of argument.

An employee is not employed as a seaman unless the vessel on which he works is in navigation so that his duties relate to the safety and welfare of the ship on a voyage.

Petitioner was not a seaman during the periods of fit out and lay up since at those times the ship was not in commission.

The Circuit Court failed to give appropriate weight to the Administrative finding that employees doing petitioner's work were not excluded from the benefits of the Act, and construed the exemption created by Section 13(a)(3) in a manner probably in conflict with applicable decisions of this Court.

VII

The Petitioner is Not a Seaman Within the Meaning of the Act.

It may be conceded at the outset that the petitioner possessed all the qualifications of a seaman, and that he may have been employed in part because of them. Of itself, however, this factor does not preclude consideration of his status during the periods of fit out and lay up. No matter what his qualifications and experience, the exemption of Section 13(a)(3) of the statute cannot apply unless the specific work performed is of a character to make the employee a seaman at the time the work is done.

Reference to other statutes and other situations avails little. "What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained." *Warner* v. *Goltra,* 293 U. S. 155, 158.

Cases which arise from other statutes offer, therefore, a precarious guide to the determination of the question presently involved. A longshoreman is a seaman under the Jones Act, *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52, but he is not, under the Fair Labor Standards Act. Mere employment on a vessel, on the other hand, is not enough to make a man a seaman. *Walling* v. *Haden,* 153 F. (2) 196 (C. C. A. 5); *Hawn* v. *American S. S. Co.,* 107 F. (2) 999 (C. C. A. 2); *Moore Drydock* v. *Pillsbury,* 100 F. (2) 245 (C. C. A. 9).

Two factors are to be considered—the nature of the employment and the status of the vessel. The commonly accepted definitions of seaman embraces both factors. While the word does not have an "absolute, unvarying significance", it is usually deemed to describe one who contributes "to the labor about the operation and welfare of the ship

when she is upon a voyage." *Norton* v. *Warner Co.*, 321 U. S. 565, 572; *The Buena Ventura*, 243 Fed. 797, 799.

The ship must be in navigation and the employee must be one on board to aid in navigation before he can be called a seaman. No matter for what purpose an employee is working aboard ship, he is not a seaman unless the vessel is in navigation. *Gonzales* v. *U. S. Shipping Board*, 3 F. (2) 168 (E. D. N. Y.); *Union Oil Co.* v. *Pillsbury*, 63 F. (2) 925 (C. C. A. 9); *The Sirius*, 65 Fed. 226 (D. C. Cal.); *The Thomas Scattergood*, Gilp. 1, Fed. Cas. 11,106; *Antus* v. *Interocean S. S. Co.*, 108 F. (2) 185 (C. C. A. 6).

On the other hand, the fact that a vessel is in navigation does not necessarily make the employees on board seamen. Although a lighter is a vessel, Tit. 46, U. S. C., Sec. 713; *Ellis* v. *United States*, 206 U. S. 246, lighter captains working on board have been held not to be seamen under Section 13(a) since the major portion of their duties is confined to handling cargo while only a relatively small part of their working time is devoted to navigational duties such as handling lines and the like. *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. (2) 971 (C. C. A. 2). Dredge employees have also been held not exempt and for substantially similar reasons. *Walling* v. *Haden, supra; Walling* v. *Bay State Dredging Company*, 149 F. (2) 346 (C. C. A. 1); *Walling* v. *Great Lakes Dredge & Dock*, 149 F. (2) 9 (C. C. A. 7). Yet these same employees, when their status under the Jones Act has been under consideration, have been held to be seamen. *Norton* v. *Warner Co., supra.*

Too much reliance cannot, therefore, be placed upon cases arising from other statutes. Whether or no petitioner was under articles cannot determine his status as a seaman. Neither can the fact that he was paid monthly, that he lived aboard, that he expected to be employed as a seaman at some future time. The test is not one of general qualifications. The exemption is restricted to one who is "employed as a seaman"; the test is, therefore, the kind of work that was being done at the time that the Act was violated. That the respondent chose to have its em-

ployees sign what were in form shipping articles is immaterial in any event. That fact could not make the petitioner a seaman if his work did not. *Seneca Washed Gravel Corp.* v. *McManigal,* 65 F. (2) 779, 780 (C. C. A. 2).

In point of fact, however, the articles themselves indicate that petitioner was not deemed a seaman by the respondent. They read that "each person signing these articles before the vessel goes into commission or leaves port, agrees that he will perform the duties assigned to him as a member of the crew in the capacity set opposite his name in preparing the vessel to go into commission or leave port, as well as during any voyage of said vessel during the term above mentioned. Each person being a member of the crew when the vessel goes out of commission or lays up, and each person signing these articles while the vessel is being prepared for non-sailing or lay up period, agrees to perform the duties assigned to him as a member of the crew in the capacity set opposite his name, and upon the completion of said duties so assigned to him, the contract of employment hereunder shall cease".

It is obvious that these so-called articles contemplate employment other than that connected with navigation. They speak of times when the vessel is out of commission and not of a voyage. The functions of a seaman's articles of agreement is to describe a voyage; ordinarily they contemplate a period of time spent at sea, and where the statute requires them, it is sufficient if they are signed at any time before the voyage commences. Tit. 46, U. S. C. A., Secs. 564, 574.[2] *The Theodore Perry,* 23 Fed. Cas. 13,880; *The Elihu Thompson,* 139 Fed. 89.

The use of such a device, sanctioned although it may be by practice, cannot serve to confer a status upon the petitioner that he does not possess. A convenient formula, such as these shipping articles, to enable the respondent for its own purposes to classify certain of its employees, cannot overcome the effect of the Act. *Tennessee Coal,*

[2] In any event, articles are not required for voyages on the Great Lakes. Tit. 46, U. S. C. A., Sec. 544.

Iron & R.R. Co. v. *Muscoda Local,* 321 U. S. 590. The problem is not one of nomenclature but of fact. If petitioner, by whatever name he is called, is not doing work in and of navigation, he is not employed as a seaman and the exemption may not be applied to him. The respondent employed him to work while the vessel was out of commission; the form that the agreement was given by the respondent cannot serve it or alter its content.

Much stress has been placed upon the fancied opposition to inclusion under the Act voiced by representatives of maritime labor during Congressional hearings.[3] But examination of the legislative proceedings reveals that the design behind this position was to exclude men employed on vessels in operation, with special emphasis upon ocean-going shipping. The Merchant Marine Act of 1936 has conferred upon the Maritime Commission jurisdiction over manning scales and wages. It was to avoid any possible conflict between agencies that the exemption was urged and enacted. This was made clear both by the representatives of labor and by the chairman of the Senate Committee.

This is a far cry from the position that all employees whose duties entail work on a vessel, whether in or out of navigation, are to be classed as seamen. The implication is clear that when the witnesses testified and when Congress acted, they did so in terms of the classic meaning of seaman, one who "labors about the operation and welfare of the ship when she is upon a voyage". *Norton* v. *Warner Company,* supra. They did not contemplate men who labor on the ship when she is out of commission.

Such is the interpretation placed upon the meaning of Section 13(a)(3) by the Administrator of the Wage and Hour Division of the Department. He has defined a seaman as one who performs " * * * service aboard a vessel which is rendered primarily as an aid in the operation of

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[3] Joint Hearing Before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7500, 75th Cong. 1st Sess., pp. 546-549, 1216, 1217.

such vessel as a means of transportation, providing he performs no substantial amount of work of a different character". *Interpretative Bulletin No. 11*, July, 1939, revised July, 1943, par. 3. The Courts below give little weight to this administrative determination, although it calls for the most serious consideration, *United States* v. *American Truck Assn's Inc.*, 310 U. S. 534, 549, and gave to the exemption a narrow meaning in harmony with the Act's remedial purpose. *Phillips Inc.* v. *Walling*, 324 U. S. 490, 493.

Reference to working conditions of seamen adds clarity to the legislative intent.[4] While the vessel is at sea, they must work 56 hours weekly. The labor witnesses at the hearings themselves expressed concern that it would be impracticable to enforce a 40-hour week under these circumstances. But that factor is not present here. There is no reason why petitioner could not work a 40-hour week during fit out and lay up, and Congress is hardly likely to have intended to extend the exemption to a class of employees whose working conditions do not demand that they be excluded. See: *Helena Glendale Ferry Co.* v. *Walling*, 132 F. (2) 616, 619 (C. C. A. 8); *Anderson* v. *Manhattan Lighterage Corp.*, supra, 973.

Petitioner can be called a seaman only if adherence be had to form to the exclusion of content. Even though the respondent chose to regard him as a seaman and treat with him as such, the fact that his work was essentially that of a laborer on a vessel withdrawn from navigation and as such divorced from navigation cannot be altered. He was not "employed as a seaman" and should be given the same rights as any other employee.

B. Petitioner was engaged in commerce and in the production of goods for commerce.

1. PETITIONER WAS ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE.

Respondent's vessels, when they were in commission, were engaged in the transportation of goods in commerce.

[4] Joint Hearings, 548.

Petitioner was employed, during fit out and lay up, to repair and maintain the vessels so that they would not deteriorate and would remain capable of performing their function. These duties comply with the statute's definition of the term "produced", i.e., "Produced, manufactured, mined, handled or in any other manner worked on * * *" (Sec. 3*j*). *Western Union* v. *Lenroot*, 323 U. S. 490, 503.

Since the Act includes ships and marine equipment in its definition of goods [Sec. 3(j)], any work necessary to placing a ship into commerce is to be characterized as production under the Act, whether it be construction or repair. *Slover* v. *Wathen*, 140 F. (2) 258 (C. C. A. 4). No rational distinction is to be drawn, in terms of Fair Labor Standards Act, between repairing and maintaining a ship and repairing or maintaining any other instrumentality of commerce, and the same rule has been applied to both. *Hertz Drivurself Stations, Inc.* v. *United States*, 150 F. (2) 923 (C. C. A. 8); cf.: *Chapman* v. *Home Ice Co.*, 136 F. (2) 353 (C. C. A. 6), cert. den. 326 U. S. 761.

2. Petitioner was engaged in commerce.

That the vessels upon which petitioner was employed were temporarily withdrawn from navigation does not remove his labors from the realm of commerce. His work had only one end—to make it possible for the ships to move in commerce, to transport goods in commerce. Any work contributing to that end is commerce, even when not so intimately associated with it as was petitioner's. *Overstreet* v. *North Shore Corporation*, 318 U. S. 125; *Pederson* v. *S. F. Fitzgerald Const. Co.*, 318 U. S. 740, 323 U. S. 698; *Slover* v. *Wathen*, 140 F. (2) 258 (C. C. A. 4); *Helena-Glendale Ferry Co.* v. *Walling*, 132 F. (2) 616 (C. C. A. 8).

Petitioner was in the employ of an interstate carrier; it is difficult to see how his work can be anything other than involved in commerce. It is difficult, too, to understand how he could be a seaman, as held by the Courts below, and not be engaged in commerce.

Conclusion

The petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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